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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

BEN M. HOGAN COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Did *Rose v. Clark,* 478 U.S. —, 106 S.Ct. 3101, 98 L.Ed. 2d 460 (1986), authorize appellate harmless error analysis of jury instructions which are unconstitutional under *Sandstrom v. Montana,* 442 U.S. 510 (1979), which absolutely prevent the jury from considering an essential element of the offense?

2. Can an appellate court affirm a criminal conviction on harmless error analysis where a constitutionally infirm conclusive presumption supplying an essential element of the offense was included in the jury instructions over specific defense objection, and the element so supplied was contested by the defense at trial?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Ben M. Hogan Company, Inc.* petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

—o—

* Petitioner has no parent company, subsidiary or affiliate required to be listed pursuant to Supreme Court Rule No. 28.1.

OPINIONS BELOW

The original opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 769 F.2d 1293 (1985). This Court's order (App., *infra*, 30a) granting the government's petition for a writ of certiorari and remanding the case to the court of appeals for further consideration is reported at 106 S.Ct. 3325 (1986). The opinion of the panel of the court of appeals on remand (App., *infra*, 31a-36a) is not yet reported.

———o———

JURISDICTION

The opinion of the panel of the court of appeals on remand was filed January 12, 1987. Petitioner's timely filed petition for rehearing was denied by the court of appeals on March 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and the time for filing this petition is governed by this Court's Rule 20.

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CONSTITUTIONAL PROVISION INVOLVED

This case involves the right to a jury trial contained in the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, * * *."

STATEMENT

Petitioner, a Little Rock family owned contractor, was convicted in a jury trial of bid rigging (15 U.S.C. § 1) and three counts of mail fraud (18 U.S.C. § 1341). On appeal the U.S. Court of Appeals for the Eighth Circuit on July 25, 1985, reversed as to the Sherman Act count, holding that a jury instruction that bid rigging constitutes an unreasonable restraint on interstate commerce, an essential element of this offense, violated the principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979). The district court had assessed a fine of $800,000 (statutory maximum was $1,000,000) on the Sherman Act count. The mail fraud convictions were affirmed and that portion of the judgment has become final. *United States v. Hogan*, 769 F.2d 1293 (8th Cir. 1985).

The Solicitor General filed a petition for writ of certiorari representing to this Court that the case presented an "issue not materially different from the one that is already before the Court in *Rose v. Clark*, cert. granted, No. 84-1974 (Oct. 7, 1985)." On this representation the Court granted certiorari, and following its decision in *Rose v. Clark*, 478 U.S. —, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), remanded the case to the court of appeals "for further consideration in light of" that decision.

On remand a majority of the panel affirmed the Sherman Act count conviction based upon its reading of *Rose v. Clark*. Petition for rehearing to the court of appeals *en banc* was denied by an evenly divided court on a vote of 5 to 5.

REASONS FOR GRANTING THE PETITION

This case presents an important, and unsettled as evidenced by the five to five decision of the court of appeals, question of whether *Rose v. Clark* authorizes affirmance of a criminal conviction on harmless error analysis where a constitutionally infirm *conclusive* presumption supplying an essential element of the offense was included in the jury instructions over specific defense objection.

Notwithstanding the assertion in the government's prior petition, this case did not, and does not, present the same issue as *Rose v. Clark*. That was a homicide prosecution in which an erroneous instruction established a *rebuttable* presumption of malice. In the case at bar the clearly erroneous instruction created a *conclusive* presumption of effect on interstate commerce based merely on the jury finding the predicate fact of bid rigging.

The Court also noted in *Rose* the compelling logical connection between the constitutionally erroneous rebuttable presumption (that all homicides are presumed to be malicious) and the predicate facts the jury would have to find beyond a reasonable doubt before the presumption had any application. It noted "No one doubts that the trial court properly could have instructed the jury that it could *infer* malice from respondent's conduct." *Rose*, 106 S.Ct. at 3108.

The case at bar presents no such logical connection. The conclusive presumption of effect on interstate commerce does not logically flow from the predicate fact of bid rigging.

Judge Bowman recognizes these distinctions in his able dissent (App. 33a-36a) and concludes:

> "In my view, the error here is the kind of error that necessarily renders a trial fundamentally unfair. I believe that a careful reading of *Rose* supports my conclusion that the harmless-error doctrine has no application to constitutional error of this dimension. No matter how strong the government's case may be, an accused is entitled to trial by jury on *all* the elements of the offense, not just some of them. Accordingly, I remain convinced that Hogan's Sherman Act conviction must be reversed."

At trial a contemporaneous specific objection was made by defendant when the district court disclosed at instruction conference that the erroneous instruction would be given. It was expressly asserted that it violated the principle of *Sandstrom v. Montana,* 442 U.S. 510 (1979) (5 Tr. 394-395).

Prior to the instruction conference defendant had contested the government's allegations and evidence concerning the interstate commerce element of the offense. Prior to trial defendant moved to dismiss the indictment on the ground that it failed to allege the requisite effect on interstate commerce. (R. 143-145) Defendant cross-examined concerning the interstate commerce issue. (e.g. 2 Tr. 152-155) and in its motion for judgment of acquittal, both at the conclusion of the government's case and at the conclusion of all the evidence, contested the sufficiency of the evidence on this issue. (3 Tr. 164; 5 Tr. 367).

However, the trial court's ruling that the jury would be charged with a mandatory conclusive instruction on the effect on interstate commerce element precluded defendant from continuing a credible challenge on the issue.

The majority of the panel in its unsigned opinion (App. 31a-33a) provides this assessment of the ruling in *Rose:*

> "In *Rose v. Clark*, the Court establishes that in a criminal trial, when evidentiary presumptions are given in a charge to the jury that may relieve the prosecution of its burden of proving every element of the crime beyond a reasonable doubt, those instructions, although amounting to constitutional error, do not require a new trial when the reviewing court can confidently say, on the record as a whole, that such error was harmless beyond a reasonable doubt. 106 S.Ct. at 3105."

It then proceeds to conclude that

> " * * * because the evidence was so dispositive of the issue of effect on interstate commerce, we can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the conclusive presumption."

This was in square conflict with that court's recent decision in *United States v. Voss*, 787 F.2d 393 (8th Cir. 1986), reversing arson convictions based on erroneous jury instructions on the interstate commerce element of that offense. In that decision the court of appeals said at 787 F.2d 398:

> "Nevertheless, it is not for us to find the facts. The Constitution forbids conviction absent proof beyond a reasonable doubt of every fact necessary to constitute the crime. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If the sixth amendment right to have a jury decide guilt and innocence means anything, *see Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), *it means that the facts essential to conviction must be proven beyond the jury's reasonable doubt, not beyond ours.*" (Emphasis supplied)

It would appear that the majority of the panel in this case on remand regarded *Rose v. Clark* as overruling its own well settled principles on unconstitutional instructions in criminal cases without regard to the fundamental rebuttable/conclusive presumption distinction.

This Court has again granted certiorari and heard arguments to address the constitutional issue of a burden-shifting *rebuttable* presumption in a criminal prosecution. In *Burger v. Kemp,* 785 F.2d 890 (11th Cir. 1986) cert. granted *Burger v. Kemp,* 55 U.S.L.W. 3306 (Nov. 3, 1986), the panel, divided two to one, held such an instruction on intent to be harmless error. Judge Johnson filed a vigorous dissent.

However, *Burger,* like *Rose,* involves a *rebuttable* presumption while in the case at bar the jury was given an erroneous *conclusive* presumption on an essential element of the offense. Here, as noted by Judge Bowman

> "The instruction thus served the same purpose as a directed verdict for the prosecution on the interstate commerce element of the charged offense. This is all far different from the rebuttable presumption at issue in *Rose,* which removed nothing from the jury's consideration." (App. 34a-35a)

It is axiomatic that an American court cannot direct a verdict against the defendant in a criminal case. *Rose* did not proport to change this.

Judge Bowman in his dissent from the majority of the panel decision in this case is not alone in concluding that *Rose* did not subject to harmless error analysis all *Sandstrom* condemned instructions. In *Hoover v. Garfield Heights Mun. Court*, 802 F.2d 168 (6th Cir. 1986), the court held that the trial court's failure to instruct on an essential element of the offense fell within the category referred to in *Rose* of *Sandstrom* errors that are not subject to harmless error analysis. In analyzing this Court's decision in *Rose*, the court said:

> "In doing so, it importantly distinguished the cases involving *Sandstrom* errors, where a jury is instructed to presume an element from predicate facts, from the cases involving instructional errors which *completely prevent* the jury from considering an element."

The *Hoover* court then concluded, contrary to the assessment of the majority in the case at bar, this to be the true teaching of *Rose*.

The majority decision of the court below misconceives the teachings of *Rose* and constitutes an important precedent to deny fundamental constitutional rights to criminal defendants. Moreover, it is in square conflict with the *Hoover* decision of the Sixth Circuit Court of Appeals.

———o———

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted.

Respectfully submitted,

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May, 1987.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1757

UNITED STATES OF AMERICA, APPELLEE,

v.

BEN M. HOGAN CO., INC., APPELLANT.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF ARKANSAS

Submitted: November 12, 1984

Filed: July 25, 1985

Before BRIGHT, Senior Circuit Judge, McMILLIAN and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Defendant Ben M. Hogan Company, Inc. (Hogan), a corporation engaged in the business of highway construction, was indicted by a grand jury on one count of conspir-

ing to restrain trade in violation of the Sherman Act, 15 U.S.C. § 1, and on three associated counts of mail fraud under 18 U.S.C. § 1341. Hogan was found guilty on all counts charged in the indictment. The District Court fined Hogan $800,000 on the Sherman Act count (Count One) and $1,000 each on the mail fraud counts (Counts Two through Four). Hogan appealed. We reverse Hogan's conviction on Count One and remand this case to the District Court for a new trial on Count One. We affirm Hogan's convictions on Counts Two through Four.

The theory upon which Hogan was prosecuted was, in essence, that between May 1979 and September 1980, Hogan conspired with A.P.T. Construction Company, Inc. (A.P.T.)[1] to allocate between themselves, through the submission of rigged bids, work contracts for certain state highway construction projects[2]. The government's prin-

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[1]A.P.T. was charged in the same indictment with the same offenses as was Hogan. Prior to trial, A.P.T. pleaded guilty to Counts One and Two and agreed to cooperate with the government in its investigation. In return, the government agreed to dismiss Counts Three and Four, to recommend that A.P.T. be fined $150,000, and not to prosecute A.P.T. further for any prior act of bid rigging.

[2]State highway projects are authorized by a highway commission and specifications for the projects are drawn by the Arkansas State Highway and Transportation Department. A public bidding process is employed in awarding contracts for the work to be done on these projects: a public announcement of a project for which a contract is to be awarded is made; a bid proposal form is requested by interested contractors; a list of contractors that have requested a proposal form is made public; completed proposal forms, which include a statement to be signed by the bidder that the proposal is made without collusion, are submitted; and a public bid letting is held. Thereafter, the contract generally is awarded to the lowest bidder. The state encourages competitive bidding and prefers not to award a contract on the basis of a single bid.

cipal witness, Leonard Thompson, president of A.P.T., testified that at the request of William Moore, vice president of Hogan, he agreed in May 1979 to submit a complementary bid, *i.e.*, a higher bid than the bid Hogan planned to submit, on project 60173. Two bids were submitted on project 60173, one from Hogan and one from A.P.T. Hogan's bid was the lower and Hogan was awarded the contract. According to Thompson, in exchange for A.P.T.'s complementary bid on project 60173, Moore promised to return the favor in the future.

Thompson testified that in July 1980, he telephoned Moore with a request that Hogan bid in excess of the amount A.P.T. planned to bid on project 60179, and that Moore agreed to do so. Thompson also testified that he was able to make a similar arrangement regarding project 60179 with Jack Freshour, president of Freshour Construction Company (Freshour Construction).[3] A.P.T., Hogan, and Freshour Construction bid on project 60179. The contract on project 60179 was awarded to A.P.T., which proved to be the low bidder.

Thompson further testified that in September 1980, he telephoned Moore with a request that Hogan bid in excess of the bid A.P.T. planned to submit on project 60234 and that Moore agreed to do so. Thompson testified that when he made the same request of Freshour, Freshour told him that Freshour Construction did not intend to bid on project 60234. Hogan and A.P.T. were the only bidders on project 60234. A.P.T. was the low bidder and was awarded the contract on project 60234.

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[3]There is no indication in the record of any proceedings against Freshour construction.

Thompson's testimony was contradicted by several witnesses. Moore acknowledged that he had had conversations with Thompson concerning projects 60173 and 60234 but denied entering into any agreements with Thompson to rig bids. Freshour testified that he never discussed making complementary bids with Thompson or anyone else. Freshour's wife testified that she had never encountered Thompson, while Thompson's testimony suggests that she had been present on one occasion when he claims to have met with Freshour at the Freshour residence.

Hogan's bid estimator and its asphalt plant superintendent testified that they never had been instructed to keep a bid above any particular amount, and that, in fact, they had standing instructions to update bids with price reductions if a downward price fluctuation during the pendency of a bid made it feasible to do so. Freshour Construction's bid estimator testified that he cut the profit margin on his company's bid on project 60179 in an effort to secure the contract.

Others eligible to bid on the projects in question testified that they were not contacted regarding the bidding on the projects alleged by Thompson to have been rigged. Thompson, however, testified that it was unnecessary to contact other bid proposal holders because their plants were located so far from the project sites that it would have been impossible from the standpoint of transportation costs for them to have underbid.

For reversal, Hogan argues that the District Court improperly instructed the jury regarding the interstate commerce element of the Sherman Act violation charged in Count One of the indictment. We agree, and we there-

fore reverse Hogan's conviction on Count One and remand this case to the District Court for a new trial on Count One.[4]

Hogan also makes a number of other claims, all of which we have carefully considered and have found to be without merit. We will, however, discuss Hogan's additional claims to the extent that they are not resolved by our reversal for instructional error on Count One.

I.

The District Court correctly characterized this case as one concerning acts which, if proved, are deemed per se unreasonable under the Sherman Act. Having done so, the court instructed the jury that:

> Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on *interstate* commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging.

Trial Transcript (Tr.) at 492 [hereinafter referred to as per se instruction] (emphasis added).[5] Hogan argues (1)

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[4]While an effect on interstate commerce is an element of the Sherman Act violation charged in Count One, it is not an element of the mail fraud violations charged in Counts Two through Four. Therefore the instructional error regarding interstate commerce did not prejudice Hogan with respect to Counts Two through Four, on which the District Court gave separate instructions.

[5]Hogan made a timely, specific objection to the instruction here at issue. The District Court denied the objection.

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that the per se instruction informed the jury that if it found Hogan's actions constituted bid rigging, it could convict Hogan without considering whether the government had proved that Hogan's actions had an effect on interstate commerce; (2) that the per se instruction created a conclusive presumption of an effect on interstate commerce; and (3) that the government thereby was unconstitutionally relieved of its burden of proving every element of its Sherman Act case.

"A conclusive presumption removes the presumed element from the case once the [government] has proven the predicate facts giving rise to the presumption." *Francis v. Franklin*, 105 S. Ct. 1965, 1971 n.2 (1985). The Supreme Court has found conclusive presumptions in criminal instructions to " 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and [to] 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom v. Mon-*

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[COUNSEL]: I object [to the government's per se instruction] on the grounds that it violates Sandstrom v. Montana in two respects. One is that the jury is instructed to presume that interstate commerce can be found from the mere doing of an act, which takes the interstate commerce issue away from the jury. That issue, Your Honor, has never been raised before. There are no cases on it. But I think there is a serious Sandstrom problem in taking—it would essentially relieve the government from its obligation of proving interstate commerce from the mere doing of an act. And I think there is a real problem with that instruction in that regard.

THE COURT: All right. That will be denied.

Tr. at 394.

tana, 442 U.S. 510, 523 (1979) (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952) and *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978)).

We have examined the per se instruction and we conclude that it could have been understood by the jury to include an unconstitutional conclusive presumption of an effect on interstate commerce. We are convinced that the District Court did not intend to create such a situation; immediately prior to giving its per se instruction, the District Court gave a correct instruction on the interstate commerce element and on the government's burden of proof regarding that element. The per se instruction, however, contradicts the court's careful instruction on interstate commerce as a separate element of the Sherman Act offense. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching [a] verdict." 105 S. Ct. at 1975.[6]

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[6]Contrary to the implication left by the dissent, nowhere in the District Court's instructions was the jury told it *had* to find that Hogan's business affected interstate commerce *before* it considered the per se instruction. If the instructions truly had required such a course of action, we would agree that Hogan's conviction on Count One could be affirmed. In actuality, however, the detailed instructions pertaining to an effect on interstate commerce were followed immediately by the per se instruction, which told the jury that the mere doing of the act, *i.e.*, bid rigging, by itself constituted an unreasonable restraint on *interstate* commerce. The District Court gave no indication whatsoever that the issues addressed in the per se instruction were separable from those addressed in the immediately pre-

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If ever there could be a case where the giving of a jury instruction that included a conclusive presumption concerning an element of a crime amounted to harmless error, this would be the case, for in the record before us there appears to be ample evidence from which the jury could have found—and perhaps did find—that element was proved. But where "[t]he conclusive presumption the jury was instructed to apply permit[s] the jury to convict [the defendant] without ever examining the evidence concerning an element of the crime[] charged," a plurality of the Supreme Court has held that "[s]uch an error deprive[s the defendant] of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Connecticut v. Johnson*, 460 U.S. 73, 87-88 (1983) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967). While the *Connecticut v. Johnson* plurality did not hold that "instructional error of constitutional dimensions may never be harmless," it did counsel that not every "form of instructional error should be analyzed for harmlessness." *Id.* at 83. Though the substantive issue of the flawed instruction in *Connecticut v. Johnson* was the critical issue of criminal intent, rather than the

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ceding sentences. *See* Tr. at 491-92. We do not wish any more than the dissent to see a convicted criminal "escape[] just punishment." *Infra* at 21. But convictions must be achieved in a just fashion. When instructions are given that, read as a whole, reasonably can be understood to contain a conclusive presumption concerning an element of the crime charged, the possibility exists that a jury could return a guilty verdict without first finding that every element of the crime has been proved beyond a reasonable doubt. Instructions that create such a possibility make it impossible for a reviewing court to conclude that the defendant has been convicted in a manner that satisfies due process.

issue of an interstate effect on commerce, the form of the instruction clearly was that of a conclusive presumption. And the plurality's summary of its holding, *see id.* at 87-88, indicates that it was the conclusive form of the instruction, more than the particular element of the crime to which the instruction pertained, that was of concern to the plurality.

Accordingly, we hold that by including the word "interstate before the word "commerce" in its per se instruction, the District Court committed reversible error.[7] We therefore reverse Hogan's conviction on Count One, the only count to which the per se instruction related, and remand this case for a new trial on Count One.

II.

Hogan claims that it is entitled to reversal of its convictions on all counts of the indictment due to the government's failure to make available to it in a timely fashion certain notes taken by government attorneys during pretrial interviews of Thompson, Moore, and Mrs. Freshour. We disagree.

The Freshour notes were disclosed to Hogan during trial. On appeal, this Court reviewed *in camera* the Thomp-

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[7]In giving its per se instruction, we believe the District Court's wisest course of action would have been to use the word "trade" in place of the words "interstate commerce." *See generally* E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 55.15 (3d ed 1977), although if the District Court had omitted the word "interstate" at the particular place in the per se instruction where it appears, Hogan's claim would be, in our view, without substance. *Cf. United States v. Koppers Company* 652 F.2d 290, 293 (2nd Cir.), *cert. denied,* 454 U.S. 1083 (1981).

son and Moore notes and ordered them disclosed to Hogan in their entirety, with directions that Hogan file a supplemental brief to explain further its position regarding the interview notes. Having considered Hogan's arguments concerning the notes, we hold that Hogan was not prejudiced by their previous unavailability.

A.

The Supreme Court held in *Brady v. Maryland,* 373 U.S. 83 (1983), that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87. In *Brady,* the prosecutor had failed to disclose exculpatory evidence. Hogan makes no plausible claim that the interview notes contain exculpatory material.[8] Rather, Hogan claims that the Thompson and Freshour notes were valuable to its defense for the purpose of impeaching the credibility of Thompson, the government's principal witness. As a recent Supreme Court case explicitly recognizes, however, impeachment evidence can be "favorable to an accused"; "[i]mpeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley,* 53 U.S. L.W. 5084, 5086 (U.S. July 2, 1985). Accordingly, if either exculpatory or impeachment evidence is suppressed by the prosecution, and if the evidence is material, reversal is warranted.

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[8]We reject an attempt by Hogan to characterize the interview notes as potentially exculpatory merely because they do not contain the exact inculpatory phraseology Hogan thought they might.

In cases decided by this Court prior to the Supreme Court's decision in *United States v. Bagley,*

> [w]hether evidence [was] sufficiently material to require its disclosure . . . [was] determined by initially considering whether the defense made a 'specific' or merely a 'general' request for its disclosure prior to trial. If a specific request was made, evidence [was] deemed material, and a reversal warranted, if disclosure of the evidence 'might have affected the outcome of the trial.' If only a general request was made, evidence [was] considered material only if it 'created a reasonable doubt that did not otherwise exist [when] evaluated in the context of the entire record.'

Scurr v. Niccum, 620 F.2d 186, 189 (8th Cir. 1980) (quoting *United States v. Agurs,* 427 U.S. 97, 104, 112 (1976)). A majority of the Supreme Court now seems to agree that irrespective of the specificity of a request for evidence made by the defense, for purposes of a *Brady* inquiry such "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[9] 53 U.S.L.W. at 5088.

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[9]This "reasonable probability" standard of materiality is taken from Part III of Justice Blackmun's opinion in *United States v. Bagley.* Only Justice O'Connor joined in Part III of Justice Blackmun's opinion. Justice White, however, in a concurring opinion joined by the Chief Justice and Justice Rehnquist, approvingly quoted the "reasonable probability" standard of materiality found in Part III of Justice Blackmun's opinion. Justice Blackmun finds this standard "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused," but he additionally addresses how reviewing courts should consider the specificity of the defense's request for evidence in making determinations of materiality

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We have carefully considered Hogan's claims that it could have used the Thompson and Freshour interview notes to impeach Thompson's credibility at trial and find that Hogan is not entitled to relief under the aegis of *Brady*. There is not a reasonable probability that the result of Hogan's trial would have been different had the notes been disclosed. The government's failure to produce these notes does not "undermine confidence in the outcome of [Hogan's] trial."[10] *Id.* at 5087.

B.

Under the Jencks Act, 18 U.S.C. § 3500, when a witness testifies for the government in a criminal prosecution, the government may, upon request by the defendant and following the witness's direct testimony, be required to pro-

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under the "reasonable probability" standard. 53 U.S.L.W. at 5088. Justice White agrees that the standard "is 'sufficiently flexible' to cover all instances of prosecutorial failure to disclose such evidence," but "see[s] no reason to attempt to elaborate on the relevance to the [materiality] inquiry of the specificity of the defense's request for disclosure . . . ." *Id.*

[10]Hogan similarly claims that it is entitled to relief under *Brady* because the Moore interview notes could have been used to rehabilitate Moore's trial testimony. This argument is meritless. The government did not attempt to impeach Moore's testimony regarding the issue on which Hogan claims the notes could have been used for rehabilitation. Absent impeachment, there is no basis for rehabilitation. Moreover, even assuming that material such as the Moore notes could be deemed favorable to the accused under *Brady*, it is hard to imagine a situation where evidence claimed to be of value to the defense solely for the purpose of bolstering a witness's favorable, unimpeached testimony will satisfy the "reasonable probability" standard of materiality. In any event, in this case the Moore notes do not satisfy that standard.

duce any statement of the witness which relates to the witness's trial testimony. Hogan made a pretrial request for, and the government voluntarily agreed to produce five days prior to trial, any Jencks Act material in the government's possession. On appeal, Hogan raises a Jencks Act claim. Because this claim seems to be focused upon the Thompson notes, we will discuss it in the context of those notes.

The government apparently concluded that the Thompson notes were not Jencks Act materials and did not produce them in advance of trial. When Hogan became aware of the Thompson notes at trial, it moved for their production. The District Court reviewed the Thompson notes *in camera,* and pursuant to the Jencks Act, ordered extrapolated from the notes and disclosed to Hogan scattered sentences and phrases within the notes that were enclosed in quotation marks. Hogan in fact did not receive this material until after both sides has rested in the presentation of their cases. Hogan now argues that it was prejudiced by the government's failure to make timely disclosure of Jencks Act material.

"Although in many cases the government freely discloses Jencks Act material to the defense in advance of trial, the government may not be required to do so." *United States v. White,* 750 F.2d 726, 729 (8th Cir. 1984). But when disclosure is ultimately required, it must be made before it is too late for the material to be put to any effective use. We need not address the timeliness of the disclosure in this case because the Thompson notes in their entirety do not as a matter of law constitute Jencks Act material and because Hogan waived any claim it may

have had regarding those portions of the Thompson notes ordered disclosed by the District Court.

The Jencks Act, in relevant part, defines a statement as "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by [a] witness and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500(e)(2).

Plainly, the Thompson notes when viewed in their entirety do not constitute Jencks Act materials because they are not statements within the meaning of the Jencks Act. *See United States v. Cuesta*, 597 F.2d 903 (5th Cir.), *cert. denied*, 444 U.S. 964 (1979) (investigators' notes of interviews do not fall under the Jencks Act even if they contain occasional verbatim recitations of phrases of interviewee). As recognized by Justice Powell, "the fact that counsel usually will take notes does not mean that the notes often will be 'statements.' Counsel rarely take down verbatim what witnesses say in these preparatory conferences. Consequently, prosecutors' notes may be expected to meet the requirements of [18 U.S.C. § 3500(e)(2)] very infrequently." *Goldberg v. United States*, 425 U.S. 94, 122 n.9 (1976) (Powell, J., concurring in judgment).[11]

While the District Court did not find that the Thompson notes in their entirety constituted Jencks Act material, it did direct, pursuant to the Jencks Act, that several sentences and phrases enclosed in quotation marks be ex-

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[11]Likewise, the Moore and Freshour notes in their entirety do not constitute Jencks Act materials and Hogan therefore has no viable Jencks Act claim with respect to them.

tracted and given to Hogan. Certainly the District Court was not required to order disclosed as Jencks Act material a few scattered sentences and phrases it found in a body of otherwise non-Jencks Act, attorneys' rough interview notes. In fact, we believe that a trial court ought not employ such a process of extrapolation unless the particular circumstances of a case are extremely compelling. In our view, it is doubtful that the circumstances of this case can fairly be characterized as compelling.[12] We decline, however, to determine whether or not the District Court erred in ordering portions of the Thompson notes disclosed. *Cf. Campbell v. United States*, 373 U.S. 487, 493 (1963) (determination by district court of producibility under the Jencks Act may not be disturbed unless clearly erroneous). Regardless of the propriety of the District Court's actions, Hogan waived any Jencks Act claim it may have had regarding the Thompson note extrapolations.

The District Court first ordered the government to disclose portions of the Thompson notes at 1:30 p.m. on May 7, 1984 during an in-chambers conference with counsel.[13] *See* Tr. at 251. On the morning of May 8, 1984, Hogan rested its case, in spite of the fact and without mentioning to the court that it had not received the material the court ordered disclosed to it on May 7. During the instruction conference, on the afternoon of May 8, 1984,

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[12]The District Court acknowledged that it acted as it did "out of an abundance of caution" and that it might have "stretch[ed] it a little far" by giving Hogan any portion of the Thompson notes. Tr. at 251, 252.

[13]The written order was dated May 7, 1984 and was filed with the court clerk on May 8, 1984.

Hogan then complained that it had not received the material. The District Court ruled that Hogan had waived its right to this material by its failure to alert the court to the matter prior to resting its case. The court reasoned that it had no way of knowing that the government had not complied with the court's order and that instead of voluntarily resting its case, Hogan should have requested some time to receive and review the material in order to make a determination as to whether it wished to present additional evidence. *See* Tr. at 410-11. We hold that the District Court correctly found Hogan's actions to constitute a waiver.

C.

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure requires the government, upon request of a defendant, to disclose relevant written or recorded statements of the defendant, as well as the substance of any oral statement made by the defendant in response to interrogation by any person then known by the defendant to be a government agent, which the government intends to offer in evidence at trial. Hogan made a broadly-phrased, pretrial request for production under Rule 16(a)(1)(A). Also prior to trial, Hogan protested to the court that counsel for Moore had informed Hogan that the government possessed notes taken by government attorneys at the time they interviewed Moore and requested that the court order the Moore notes produced. The District Court never explicitly granted or denied this request, but ruled that the discovery proposal of the government, which did not include production of the Moore notes, was accept-

able. Hogan now claims that it should have been provided with the Moore notes pursuant to Rule 16(a)(1)(A).

Assuming *arguendo* that the Moore notes should have been disclosed to Hogan under Rule 16(a)(1)(A), we hold that the nondisclosure of these notes is not a ground for reversal because Hogan's substantial rights were not thereby prejudiced. *See United States v. Bledsoe,* 674 F.2d 647, 670 (8th Cir.), *cert. denied,* 459 U.S. 1040 (1982). As we already have concluded, it is not reasonably probable that the result of the trial would have been different had the Moore notes been disclosed.

III.

Hogan claims there was a substantial variance between the single conspiracy charged in the indictment, as voluntarily clarified prior to trial by the government, and the proof at trial. We reject this claim.

The indictment charged Hogan with a single conspiracy to rig bids on an unspecified number of highway projects in central Arkansas. Although a formal bill of particulars was never ordered, the government filed a voluntary disclosure two months before trial, specifying three projects on which Hogan was believed to have participated in bid rigging and defined "central Arkansas" as Pulaski County and its adjacent counties. The voluntary disclosure also referred to two to four other unspecified projects on which bids purportedly were rigged with Hogan's cooperation. Hogan contends that it thus was charged with a massive conspiracy to rig five to seven bids on projects in a multi-county area, while the proof adduced

at trial related to only three bids on projects in a single county.[14]

Clearly Hogan, was, on the basis of the indictment and the government's voluntary disclosure, notified well in advance of trial that it was charged with rigging bids on the three Pulaski County projects to which the proof at trial related, and Hogan had every opportunity to plead to and defend against those charges. The indictment charged Hogan with conspiring to rig bids in violation of the Sherman Act; that charge was not changed by the government's voluntary disclosure and, subject to the interstate commerce problem discussed in Part I of this opinion, was proved at trial. The violation shown was merely narrower than the violation charged. Under these circumstances, Hogan was not prejudiced. *See United States v. Miller*, 105 S. Ct. 1811, 1814-16 (1985).[15]

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[14]Hogan makes a related argument that the proof established separate bid rigging conspiracies, rather than the single conspiracy with which Hogan was charged. There is, however, substantial evidence in the record from which a jury reasonably could find a single, overall conspiracy concerning projects 60173, 60179, and 60234. Such a conclusion is not undermined by the fact that there was evidence of multiple sub-conspiracies, *i.e.*, of the agreements made at the time of each of the three bid lettings, constituting objects of the overall conspiracy. *See Koolish v. United States*, 340 F.2d 513, 525 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965). And, contrary to Hogan's assertions, a single conspiracy is not transformed into multiple ones merely by the lapse of time. *United States v. Villa*, 599 F.2d 21, 24 (2nd Cir.), *cert. denied*, 444 U.S. 837 (1979).

[15]We also are unpersuaded by Hogan's alternative claim that it was prejudiced by Thompson's explanation of Freshour's willingness to submit a complementary bid on project 60179; Thompson testified that because he had agreed, at Freshour's request, to submit complementary bids on two projects in April

(Continued on following page)

Hogan claims that it was prejudiced by the introduction at trial of A.P.T.'s guilty plea. *See supra* note 2. Government counsel informed the District Court that it anticipated use by defense counsel of A.P.T.'s guilty plea to impeach Thompson's credibility and proposed that it first be allowed to bring to the jury's attention the matter of A.P.T.'s guilty plea. Tr. at 112, 147-49. Defense counsel objected generally to this course of action, Tr. at 114, but in no way denied that counsel intended to use the guilty plea to attack Thompson's credibility. The District Court ruled that government counsel would be permitted to introduce the fact of A.P.T.'s guilty plea during its direct examination of Thompson.

The following cautionary instruction was given before Thompson testified concerning the guilty plea:

(Continued from previous page)

1979, Freshour was willing to do so on project 60179. Hogan argues that reference to these April 1979 projects fixes commencement of the conspiracy at a point preceding Hogan's involvement in May 1979 and thus, that the proof at trial was of a conspiracy broader than that charged. Thompson's explanation first was elicted by Hogan on cross-examination and was consistent with Thompson's grand jury testimony, a copy of which had been provided to Hogan in advance of trial. Hogan cannot seriously claim prejudice on the basis of an answer to a question which it asked solely to challenge Thompson's credibility and which exceeded the scope of direct examination, especially when Hogan, based on the availability of Thompson's grand jury testimony, must have known what answer Thompson likely would give. Furthermore, any evidence of a conspiracy in April 1979 would have no bearing whatsoever upon Hogan; Thompson did not implicate Hogan with respect to the April 1979 projects, he spoke only of an agreement between A.P.T. and Freshour Construction. Therefore, Hogan was not required at trial to defend against any charge that it had not been informed of by the indictment.

> [E]vidence of a witness's own guilty plea, that is, Mr. Thompson for A.P.T. Company, cannot be used except to assess the credibility of the witness and also as an acknowledgment of the witness's participation in the offense charged, but it cannot be considered as substantive evidence of the defendant Ben Hogan Company's guilt, and no inference of guilt as to the Ben Hogan Company can be inferred from A.P.T.'s plea.

Thompson Transcript at 3. Government counsel then questioned Thompson briefly to establish the fact that A.P.T. had pleaded guilty. On cross-examination, in an obvious attempt to impeach Thompson's credibility, counsel for Hogan questioned Thompson extensively about A.P.T.'s guilty plea. *Id.* at 51-54. In its formal charge to the jury, the District Court again explicitly cautioned the jury that evidence of A.P.T.'s guilty plea could be used only in assessing Thompson's credibility and not in determining Hogan's guilt or innocence. *See* Tr. at 472-73.

> Evidence that [a co-defendant] entered a plea of guilty to the same offense is not error unless it is elicited as substantive proof of the defendant's guilt. Where it is introduced for other purposes, such as to impeach, to reflect on a witness' credibility, or to show the witness' acknowledgment of participation in the offense, evidence of a co-defendant's guilty plea is clearly admissible. In such circumstances, the trial judge should instruct the jury that the evidence is received for this purpose alone and that the plea cannot form the basis of any inference as to the guilt of the defendant.

United States v. Wiesle, 542 F.2d 61, 62 (8th Cir. 1976); *cf. Wallace v. Lockhart*, 701 F.2d 719, 725-26 (8th Cir.), *cert. denied*, 104 S.Ct. 340 (1983) (relying on *United States*

v. Wiesle) (co-defendant's prior conviction introduced to show acknowledgment of participation in the crime); *United States v. Basic Construction Company*, 711 F.2d 570, 574 (4th Cir.), *cert. denied*, 104 S. Ct. 371, 527 (1983) (given the court's cautionary instruction, no error for court to tell jury of co-defendants' nolo contendere pleas although it is better to simply tell jury that cases of co-defendants had been disposed of without saying how).

We find the introduction of the guilty plea in this case to have been in keeping with *United States v. Wiesle* and thus within the District Court's discretion. The jury's use of the plea was carefully limited by the District Court to assessment of Thompson's credibility and to A.P.T.'s acknowledgment that Thompson participated in the offense charged. We need not hold the introduction of the plea improper merely because it first was injected into the case by the government on direct examination of Thompson. *Cf. United States v. Koppers Company*, 652 F.2d 290, 299 (2nd Cir.), *cert. denied*, 454 U.S. 1083 (1981) (references to report which revealed that government's principal witnesses had perjured themselves in early phases of investigation of rigged road construction bids were properly elicited by government on direct examination to anticipate attempts by defense counsel to attack witnesses' credibility). Hogan's claim of prejudice is further eroded by the fact that Hogan's counsel made extensive use of the plea on cross-examination in an attempt to impeach Thompson's testimony. *Cf. id.; United States v. Schmaltz*, 562 F.2d 558, 560 (8th Cir.), *cert. denied*, 434 U.S. 957 (1977) (where co-defendant pleaded guilty after jury was impaneled and court, without giving a cautionary instruction, informed jury that co-defendant's case had been re-

solved, defendant suffered no substantial prejudice, especially since defense counsel called co-defendant to the stand and extensively examined him regarding the guilty plea).

V.

Hogan makes additional challenges to the jury instructions given by the District Court, as well as to the District Court's refusal to give two particular instructions proposed by Hogan. We have examined the charge to the jury as a whole and find that Hogan's remaining challenges to the court's instructions are meritless. We also find that the District Court did not abuse its discretion in refusing to instruct the jury as requested by Hogan. Similarly, we reject Hogan's claims of error regarding various other discovery and evidentiary matters. Our review discloses that these matters were entirely within the District Court's soundly exercised discretion.

VI.

Finally, Hogan claims that government counsel improperly injected government counsel's credibility into the trial and misstated the evidence. We have considered these claims and find them to be without merit. However, we caution government counsel on retrial to avoid making statements that could be construed as an injection into the trial of government counsel's credibility or statements of the evidence that are not faithfully accurate. While we do not wish to discourage spirited advocacy, prosecutorial misconduct is a serious matter, and this Court will not allow actual instances of such misconduct to go unremedied.

VIII.

With respect to Hogan's conviction on Count One, the judgment of the District Court is reversed and this case is remanded to the District Court for a new trial. With respect to Hogan's convictions on Counts Two through Four, the judgment of the District Court is affirmed.

McMILLIAN, Circuit Judge, concurring.

I concur in the decision to reverse and remand for new trial appellant's conviction for conspiracy to restrain trade in violation of the Sherman Act (count 1) by submitting rigged bids for certain state highway construction projects. I agree that the instruction describing the types of conduct considered unreasonable per se under the Sherman Act contained a conclusive presumption of an effect on interstate commerce which improperly removed that element of the offense from the consideration of the jury. *See* Part I *supra*. I also concur in the analysis in Parts II (government nondisclosure of exculpatory material and statements of the defendant), III (variance), V (instructions and other discovery and evidentiary matters), and VI (prosecutorial misconduct).

With respect to Part IV, I acknowledge that the analysis therein of the anticipatory introduction of APT's guilty plea is consistent with the position set forth for this Circuit in *United States v. Wiesle*, 542 F.2d 61, 62 (8th Cir. 1976). I write separately only to restate my belief that the better rule is to not "allow the government to introduce evidence as part of its case-in-chief that a codefendant had pleaded guilty to the same or similar offense with which the defendant is charged." *United States v. Hutchings*,

751 F.2d 230, 239 (8th Cir. 1984) (McMillian, J., specially concurring).

Finally, I note that although the conspiracy to restrain trade count, for which conviction the district court had imposed a substantial fine in the amount of $800,000, has been reversed and remanded for new trial, the court has today affirmed appellant's conviction for three counts of mail fraud in connection with the state highway construction bid-rigging scheme. The district court imposed a fine of $1,000 on each of the mail fraud counts. This is the maximum fine that the district court could have imposed for the offense of mail fraud. *See* 18 U.S.C. § 1341. Mail fraud may also be punished by imprisonment for not more than five years. It is, of course, impossible to imprison the corporation itself; it would not, however, be impossible to imprison, following investigation, indictment, trial, and conviction, those corporate officers or employees who acted unlawfully on behalf of the corporation. We have often observed that a corporation cannot take action itself but must act through persons. In my view, it is time to reexamine the prosecution and punishment of corporate crime and to focus upon not only the wrongdoing of the corporate entity but also upon that of its human actors.

BRIGHT, Senior Circuit Judge, dissenting.

After a lengthy trial, a corporation found guilty of bid rigging escapes just punishment on grounds that the trial court erred in instructing the jury. I must dissent. A reading of the instructions as a whole discloses no error at all, for the experienced and able trial judge fully explained the interstate commerce element necessary to convict.

1) The recitations of the indictment indicated the necessity for proof of conduct restraining interstate commerce. The trial court instructed, with regard to the indictment:

> In Count One the defendants are charged with having engaged, from sometime in or about May, 1979 to about September, 1980 in a combination and conspiracy in unreasonable restraint of certain interstate trade and commerce * * *.

2) The court explicitly stated that, as one element of the offense charged, the conspiracy must affect interstate commerce:

> Three elements are required to be proved beyond a reasonable doubt in order to establish the offense of conspiracy charged in the indictment.
>
> * * * *
>
> Third, that the conspiracy * * * either affected interstate commerce or occurred within the flow of interstate commerce.

3) Finally, the court gave the jury a detailed definition of "interstate commerce":

> The Sherman Act is not applicable unless it is first established that there is a restraint or attempted restraint of interstate commerce. Before you can find the defendant guilty, you must find beyond a reasonable doubt that there was such an actual or attempted restraint. You may so find when the allegedly illegal conduct, as charged in the indictment, has a direct impact on goods moving in interstate commerce—which means across state lines—or on goods which are in the flow of commerce—as when the goods are in the state of origin awaiting interstate shipment or in the state of destination on the way to the final consumer.

After giving the above instructions, the court gave the instruction challenged here. The instruction in question was merely part of the court's definition of an "unreasonable" restraint:

> To restrain interstate commerce means to interfere *unreasonably* with the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade [sic] and commerce.
>
> * * * *
>
> The government's burden is satisfied by a showing that the defendant's business activities substantially affected interstate commerce.
>
> Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging.

(Emphasis added).

We must consider the instructions as a whole, not in isolation, in determining whether a trial court erred. *United States v. Park*, 421 U.S. 658, 674-75 (1975); *Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973); *Aimor Electric Works, Ltd. v. Omaha National Bank*, 727 F.2d 688, 691 (8th Cir. 1984). Here, reading the instructions as a whole demonstrates their propriety. The trial court explained first that the Sherman Act did not apply without a restraint or attempt to restrain *interstate* commerce. The court then explained that the restraint had to be unreasonable, and that certain types of restraints were unreasonable per se. Under these instructions, the jury had to find

that the defendant's business was in interstate commerce before it considered the per se instruction.

Because I do not find error, much less prejudicial error in the instructions, I would affirm.

A true copy

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-1757EA

UNITED STATES OF AMERICA, APPELLEE

v.

BEN M. HOGAN CO., INC., APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of conviction of Count I of the indictment is reversed and the cause remanded for a new trial on Count I. It is further ordered and adjudged that the judgment of conviction on Counts

II through IV of the indictment is affirmed in accordance with the opinion of this Court.

July 25, 1985

A True Copy:

ATTEST: /S/

CLERK U.S. COURT OF APPEALS,
8TH CIRCUIT

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

July 7, 1986

Mr. Robert V. Light
2000 First Commercial Building
Little Rock, AR 72201

Re: United States,
v. Ben M. Hogan Company, Inc.
No. 85-1067

Dear Mr. Light:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Rose v. Clark, 478 U.S. — (1986).

Very truly yours,

/s/ Joseph F. Spaniol, Jr.,
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No, 84-1757

United States of America,	*	
	*	
Appellee,	*	Appeal from the
v.	*	United States Dis-
	*	Court for the East-
	*	ern District of Ar-
	*	kansas.
Ben M. Hogan Co., Inc.,	*	
Appellant	*	

Filed: January 12, 1987

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and BOWMAN, Circuit Judge.

In a divided opinion, this court reversed the conviction of Ben M. Hogan Company on one count of conspiracy to restrain trade in violation of the Sherman Act, 15 U.S.C. § 1 (1982) and affirmed its conviction on three associated mail fraud counts. *United States v. Ben M. Hogan Co.*, 769 F.2d 1293 (8th Cir. 1985).

The court reversed Hogan's conviction because, in its per se instruction on bid rigging, the district court failed to advise the jury that Hogan's actions must have affected interstate commerce. We reversed notwithstanding the likelihood that the error in the instruction might well be deemed harmless. *See id.* at 1297-98.

Subsequently, on petition for writ of certiorari by the Government, the Supreme Court granted the Government's petition, vacated the judgment, and remanded "for

further consideration in light of *Rose v. Clark,* 478 U.S. —, 106 S. Ct. 3101, 90 L.Ed.2d — (1986)." *United States v. Ben M. Hogan Co.,* 106 S. Ct. 3325 (1986).

In *Rose v. Clark,* the Court establishes that in a criminal trial, when evidentiary presumptions are given in a charge to the jury that may relieve the prosecution of its burden of proving every element of the crime beyond a reasonable doubt, those instructions, although amounting to constitutional error, do not require a new trial when the reviewing court can confidently say, on the record as a whole, that such error was harmless beyond a reasonable doubt. 106 S. Ct. at 3105.

Our review of the record shows that the court first instructed the jury that the Sherman Act did not apply without a restraint or attempt to restrain interstate commerce. The court then explained that the restraint had to be unreasonable and that certain types of restraints were per se unreasonable. Although the per se instruction created a conclusive presumption that interstate commerce was affected, the jury could not even consider the per se instruction unless it had first found that interstate commerce had been affected. Accordingly, read as a whole, the instructions do not constitute prejudicial error. Furthermore, because the evidence was so dispositive of the issue of effect on interstate commerce, we can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the conclusive presumption. *Id.* at 3109 (citing *Connecticut v. Johnson,* 460 U.S. 73, 97 n.5 (1983) (Powell, J., dissenting)).

Accordingly, we now affirm the conviction against Hogan on count one for violation of the Sherman Act and

the fine imposed of $800,000 as well as reaffirm the convictions on mail fraud, counts two, three and four.

BOWMAN, Circuit Judge, dissenting.

Because I believe that the harmless-error analysis approved in *Rose v. Clark,* 106 S. Ct. 3101 (1986), is inapplicable to the present case, I respectfully dissent. *Rose* is a homicide case. It deals with an erroneous instruction that established a rebuttable presumption of malice.[1] As the Court was careful to note, " 'Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue.' " *Id.* at 3107, n.8 (quoting *Connecticut v. Johnson,* 460 U.S. 73, 95, n.3 (1983)). The Court also observed that

> Despite the strong interests that support the harmless-error doctrine, the Court in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case.
>
> * * *
>
> This limitation recognizes that some errors necessarily render a trial fundamentally unfair.

106 S. Ct. at 3106. After offering several examples of errors that would necessarily render a trial fundamentally unfair, the Court adds to the list of examples by remarking that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury." *Id.* It matters not that the evi-

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[1]The instructions defined malice as '"an intent to do any injury to another, a design formed in the mind of doing mischief to another."' 106 S. Ct. at 3104.

dence of the accused's guilt is overwhelming, for the rule against directed verdicts for the prosecution

> stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. *See Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Id.

In the present case, the per se instruction informed the jury that if it found Hogan's actions constituted bid-rigging, it could convict Hogan of a violation of the Sherman Act without considering whether the government had proven that Hogan's actions had an effect on interstate commerce. In other words, unlike the instruction in *Rose,* the instruction here established a conclusive, rather than a rebuttable, presumption—a conclusive presumption of effect on interstate commerce. *See United States v. Ben M. Hogan Co.,* 769 F.2d 1293, 1297 (8th Cir. 1985). Thus, once the government had proven bid-rigging, the presumption removed the interstate commerce element from the case, since the jury had been instructed that "the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce." Trial Transcript at 492. If the jury conducted its deliberations in keeping with this erroneous per se instruction (and we have no way of knowing that it did not), the instruction necessarily prevented the jury from considering the interstate commerce issue. The instruction thus served the same purpose as a directed verdict for the prosecution on the interstate commerce element of the charged offense. This is all far different

from the rebuttable presumption at issue in *Rose*, which removed nothing from the jury's consideration.

Moreover, in *Rose* there is a strong logical connection between the constitutionally infirm rebuttable presumption (that all homicides are presumed to be malicious) and the underlying predicate facts that the jury would have to find beyond a reasonable doubt before the presumption could come into play. "No one doubts that the trial court properly could have instructed the jury that it could *infer* malice from respondent's conduct." *Rose*, 106 S. Ct. at 3108. (Emphasis in original.) The Court's opinion drives this point home by quoting from *Hopper v. Evans*, 456 U.S. 605, 613 (1982): ' "It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon, engaged in an armed robbery, admits to shooting his victim in the back. . . ." ' 106 S. Ct. at 3108, n.10. The Court goes on to remark that "it would defy common sense to conclude that an execution-style killing or a violent torture-murder was committed unintentionally." *Id.*

In stark contrast to *Rose*, the conclusive presumption in the present case (effect on interstate commerce) does not flow as a matter of logical inference from the predicate fact of bid-rigging. To establish bid-rigging, the government needed to show only that Hogan conspired with one or more of its competitors to manipulate the competitive-bidding process with respect to one or more road-paving jobs. Additional proof was necessary to show that Hogan's bid-rigging effected interstate commerce. Unlike *Rose*, by no stretch of the imagination would it have been proper here to instruct the jury that it could simply *infer* the requisite effect on interstate commerce from

Hogan's conduct. Again, the error in the present case is far different from the error in *Rose,* and far more inimical to the Sixth Amendment's unequivocal command of trial by jury in all criminal prosecutions.

In my view, the error here is the kind of error that necessarily renders a trial fundamentally unfair. I believe that a careful reading of *Rose* supports my conclusion that the harmless-error doctrine has no application to constitutional error of this dimension. No matter how strong the government's case may be, an accused is entitled to trial by jury on *all* the elements of the offense, not just some of them. Accordingly, I remain convinced that Hogan's Sherman Act conviction must be reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[PUBLISH.]

APPENDIX E

JUDGMENT

No formal judgment has been entered on the foregoing opinion inasmuch as the court of appeals has ordered its mandate stayed pending disposition of this petition.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1757EA

United States of America,	*	
Appellee,	*	Appeal from the
	*	United States Dis-
vs.	*	trict Court for the
Ben M. Hogan Co., Inc.,	*	Eastern District of
	*	Arkansas.
Appellant.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied by an evenly divided Court.

Judges Richard S. Arnold, John R. Gibson, Pasco M. Bowman, Roger L. Wollman and Frank Magill voted to grant the petition.

Petition for rehearing by the panel is also denied.

March 30, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.